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No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

JOHN G. ROBERTS, JR.
Acting Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROGER CLEGG
Deputy Assistant Attorney General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding a qualitative enhancement for minority ownership in comparative license proceedings violates the equal protection component of the Fifth Amendment.

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INTEREST OF THE UNITED STATES

The United States is responsible for enforcing many statutes prohibiting discrimination on the basis of race or national origin (see, *e.g.*, 42 U.S.C. 2000e-5(f)(1)), and may intervene in cases brought under the Fourteenth Amendment (see, *e.g.*, 42 U.S.C. 2000h-2). In this case, the United States filed a brief as amicus curiae in the court of appeals, and twice filed extensive comments with the Commission as part of the inquiry proceeding to consider the validity of its minority preference policies.[1] In each of these submissions, the United States maintained that the Commission's policies could not withstand the exacting scrutiny required by the Constitution and this Court's decisions, and were thus invalid. The United States adheres to that position.[2]

[1] See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986), modified, 2 F.C.C. Rcd 2377 (1987).

[2] Given the position of the United States on the question presented, and in order for the Court to have the benefit of the views of the administrative agency involved, the Acting Solicitor General has authorized the Federal Communications Commission to appear before this Court through its own attorneys. See 28 U.S.C. 518(a); 28 C.F.R. 0.20(a).

STATEMENT

1. In the Communications Act of 1934, Congress assigned the Federal Communications Commission (FCC) exclusive authority to grant licenses to build and operate radio and television stations in the United States. See 47 U.S.C. 151, 301, 303, 307. When two or more persons file mutually exclusive applications for the same broadcasting authority, the FCC conducts what is known as a comparative hearing to determine which applicant will best serve the "public convenience, interest, or necessity." 47 U.S.C. 303. See generally *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [*1965 Policy Statement*]. In such a proceeding, the FCC weighs both "quantitative" and "qualitative" attributes of competing applicants. The quantitative assessment generally rests on each applicant's proportional integration of ownership into management and each applicant's other media holdings. If one applicant has a clear quantitative advantage, then that applicant will receive the license if he is otherwise qualified. Pet. App. 4a. If there are no significant quantitative differences among the applicants, the FCC then assesses each applicant's relative strengths on a variety of "qualitative" factors. These factors include local residence, participation in civic activities, past broadcast experience, and—of particular relevance here—the race (and gender) of the owner. See Pet. App. 4a; *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978).

As originally conceived and implemented, the FCC's selection criteria for comparative license proceedings were race-neutral. However, in response to decisions of the District of Columbia Circuit, see, *e.g.*, *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974); *Garrett* v. *FCC*, 513 F.2d 1056 (1975), the FCC adopted a policy of awarding preferences in comparative proceedings for minority ownership. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-981 (1978) [*1978 Policy Statement*]; *WPIX, Inc.*, 68 F.C.C.2d at 411-412; Minority Ownership Taskforce, FCC, *Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [*Task Force Report*]. The Commission explained that the policy

was required because "[f]ull minority participation in the ownership and management of broadcast facilities results in more diverse selection of programming • • • [, and] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the [broadcast] spectrum." *1978 Policy Statement*, 68 F.C.C.2d at 981.[3]

For purposes of the preference policy, the Commission defined "minorities" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *1978 Policy Statement*, 68 F.C.C.2d at 980 n.8. Minority ownership and participation in management is a "plus-factor [to be] weighed along with all other relevant factors in determining which applicant is to be awarded a preference." *TV 9, Inc.*, 495 F.2d at 941 n.2. The FCC awards a credit for minority ownership to the extent that an individual minority owner will actively participate in the management of the station. See *id.* at 941; *WPIX, Inc.*, 68 F.C.C.2d at 411-412.

2. In 1982, the FCC assigned a new UHF television channel to Orlando, Florida. See *Amendment of § 73.606(b), Table of Assignments, Television Broadcast Stations (New Smyrna Beach, Orlando, and Winter Park, Florida)*, 50 Rad. Reg. 2d (P & F) 1714 (1982). The following year, competing applications to build and operate that television station were filed with the FCC by three entities: petitioner Metro Broadcasting, Inc., a corporation owned by nine men, four of whom are local residents and

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[3] This programming diversity rationale undergirds other FCC policies designed to promote greater minority participation in broadcasting. Since 1978, the FCC has sought to increase such minority participation by awarding tax incentives to station owners who sell facilities to minority-controlled applicants. See 26 U.S.C. 1071; *1978 Policy Statement*, 68 F.C.C.2d at 982-983. By statute, Congress has also directed the FCC to use minority preferences in the assignment by lottery of certain low-power stations. See 47 U.S.C. 309(i)(3)(A).

Moreover, in 1978, the FCC adopted its "distress sale" program, under which licensees, under certain circumstances, may sell stations at below market prices rather than risk revocation or nonrenewal of the license—but only to minority-controlled buyers. *1978 Policy Statement*, 68 F.C.C.2d at 983. The validity of that program is before the Court in *Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, cert. granted, No. 89-700 (Jan. 8, 1990).

one of whom is black; Rainbow Broadcasting Company, a general partnership consisting of two women and one man, all of whom are Hispanic; and Winter Park Communications, Inc., a corporation with no minority ownership. Pet. App. 2a-4a, 81a-88a; *Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073, 1079-1086 (1983). After disqualifying Rainbow for misrepresentations in its proposal, the administrative law judge granted the license to petitioner, concluding that it was "an overwhelming comparative winner over Winter Park." *Id.* at 1087-1088.

The FCC's Review Board reversed that decision and awarded the permit to Rainbow. Pet. App. 64a-93a; see *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (1984). The Board concluded, contrary to the ALJ's findings, that Rainbow was a qualified applicant, and thus proceeded to compare all three applicants. The Board determined that Rainbow was not only quantitatively ahead of petitioner, but also qualitatively superior because Rainbow was entitled to "a substantial preference for minority participation [in management] by 90% of its stock ownership * * * in contrast with [petitioner's] 19.8% credit [for minority participation]." Pet. App. 87a. The Board also gave Rainbow "a solid broadcast preference" because one of its principals' past broadcast experience was "much more significant" than that of petitioner's owners. *Ibid.*

In October 1985, the FCC denied both petitioner's and Winter Park's applications to review the Board's decision. Pet. App. 60a-63a. As a result, the Board's ruling became the FCC's final administrative decision under 47 U.S.C. 155(c)(3). Petitioner and Winter Park filed timely appeals from the Commission's decision to the District of Columbia Circuit.[4]

[4] The disposition of those appeals was delayed for several years because of events arising out of related proceedings. In August 1985, a panel of the court of appeals held that the FCC had exceeded its statutory authority by adopting a female preference in comparative license proceedings. *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The en banc court of appeals, however, granted a petition for rehearing, vacated the panel opinion, and ordered supplemental briefing. The court of appeals later granted the FCC's motion for remand, and the Commission initiated a non-adjudicatory inquiry proceeding to consider the validity of its female and minority preference policies. See note 1, *supra*.

As a result of the remand in the *Steele* case, the court of appeals also remanded the record in the instant case to the FCC. Pet. App. 58a-59a. On remand, the FCC concluded that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to [petitioner]." Pet. App. 57a; see *Metro Broadcasting, Inc.*, 2 F.C.C. Rcd 1474, 1475 (1987). The FCC therefore held this case in abeyance pending the outcome of its inquiry proceeding reexamining its minority preference policies.

In response to the FCC's initiation of its inquiry proceeding, however, Congress in 1987 enacted an appropriations rider that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its minority and female preference policies. Pub. L. No. 100-202, 101 Stat. 1329-31 to 1329-32 (1987). Congress has since extended the prohibition through fiscal years 1989 and 1990. See Pub. L. No. 100-459, 102 Stat. 2216-2217 (1988); Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989).

In response to the appropriations rider, the FCC closed its inquiry proceeding and reinstated its policy of awarding gender and racial preferences in comparative license proceedings. See, *e.g.*, *Faith Center, Inc.*, 3 F.C.C. Rcd 868 (1988). The FCC then reaffirmed its earlier decision in this case awarding the permit to Rainbow and denying petitioner's competing application. Pet. App. 48a-51a; see *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988).

[5] The court of appeals declined to address the validity of the FCC's gender preference policy, because the FCC had "determined * * * that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation." Pet. App. 10a n.5 (citing 3 F.C.C. Rcd at 867 n.1 (Pet. App. 49a n.1)). For that reason, the validity of that policy is not before this Court.

3. In April 1989, a divided court of appeals affirmed. Pet. App. 1a-46a. The court first determined that the constitutionality of the FCC's minority ownership policy was properly at issue because "the Commission found on remand that Rainbow's enhancement for minority ownership was probably dispositive." *Id.* at 10a; see note 4, *supra*.[5] The majority then concluded that the decision in *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985), squarely controlled, and thus that the FCC's policy "easily passes constitutional muster." Pet. App. 10a (quoting *West Michigan*, 735 F.2d at 613).

The majority noted that the *West Michigan* court had upheld the FCC's comparative hearing minority preference policy for two principal reasons. First, the policy was not a rigid quota system, but rather "a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is de-

signed to obtain a diverse mix of broadcasters," 735 F.2d at 613 (emphasis in original). Second, in amending 47 U.S.C. 309(i) in 1982 to authorize the FCC to award minority preferences in lotteries, Congress had recognized that the underrepresentation of minorities in broadcasting stemmed from racial discrimination, and therefore "must be understood to have viewed the sort of enhancement used here as a valid remedial measure," 735 F.2d at 613-614. Finally, the majority concluded that *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), did not undermine the validity of *West Michigan* or call into question the FCC's minority preference policy. Pet. App. 12a-13a.

Judge Williams dissented from the court's constitutional holding. Pet. App. 18a-46a. He concluded that this Court's recent decisions in *Croson* and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), "largely undermined" the validity of *West Michigan* and thus the constitutionality of the FCC's minority preference policy as well. Pet. App. 18a. In his view, the FCC's asserted rationale for its policy—promoting diversity in programming—cannot survive *Croson*. See *id.* at 18a, 19a-30a. Judge Williams further concluded that the alternative justification of remedying prior discrimination could not be relied upon, because it was asserted only by Rainbow—not the FCC—and in any event might not meet the constitutional standards articulated in *Wygant* and *Croson*. See *id.* at 30a-45a.[6]

SUMMARY OF ARGUMENT

I. The FCC's policy classifies on the basis of race and is therefore constitutionally suspect. In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that a state or local government's use of a racial classification is subject to "strict scrutiny," that is, the racial classification must be "narrowly tailored" to achieve a "compelling governmental interest." In our view, a racial classification

[6] The court of appeals later denied petitions for rehearing, together with suggestions of rehearing en banc, filed by both Winter Park and petitioner. Pet. App. 96a-97a, 98a-99a. Judges Silberman, Williams, D.H. Ginsburg, and Sentelle dissented from the denial of rehearing en banc. *Id.* at 98a-99a.

adopted by the federal government, no less than a state or local government, should be subject to the same exacting standard of review. In deciding whether a federal preference program is designed to achieve a compelling governmental interest, a determination made by Congress that there is a need for remedial race-conscious action should be entitled to significant deference. This additional measure of deference is appropriate, however, only if Congress itself makes the critical determination that such a program is required, and only if this determination has a demonstrable basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling governmental interest identified by Congress.

II. A. This Court has endorsed only one sufficiently compelling justification for a racial classification: remedying the effects of identified present or past racial discrimination. That justification, however, may not be invoked to uphold the preference policy at issue. First, Congress has not specifically mandated that the Commission maintain a policy of granting preferences to minority applicants in comparative license proceedings in order to remedy prior discrimination. Second, even if Congress could somehow be viewed as having advanced a remedial justification, it cannot be said that Congress had sufficient evidence before it of prior discrimination in the broadcasting industry—let alone in the awarding of broadcast licenses—to justify race-conscious relief. Finally, the FCC, the agency that adopted the "policy" Congress has frozen, has consistently taken the position that that policy is *not* designed to remedy prior discrimination in the broadcasting industry.

Even if it could be said that the FCC's preference policy was designed to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose. Neither Congress nor the Commission has considered, much less tried, less intrusive race-neutral means to increase minority ownership of broadcasting licenses. Moreover, the minority preference policy is not aimed at correcting the actual effects of past discrimination, but instead reflexively confers an added benefit on all who possess the requisite skin color or ethnic background.

B. The second asserted justification for the minority preference policy is to further diversity of programming. But

the Court has never held that such a quest for programming diversity is a sufficiently compelling justification for the government's use of a racial classification, and there is reason to question whether that justification—as applied to the public broadcasting spectrum—would so qualify. The notion that race or ethnicity is a valid proxy for programming choices is precisely the type of racial stereotyping that is anathema to basic constitutional principles.

Moreover, even if programming diversity could count as a compelling governmental interest, it cannot be said that either Congress or the FCC has established the factual predicate necessary to support the use of racial classifications to promote programming diversity. The legislative history shows at most that Congress relied on untested assumptions—about the existence of distinct "minority" viewpoints, about whether those viewpoints are underserved by today's broadcasting industry, and about whether increasing minority ownership would translate into more "minority" programming. Nor does the administrative history of the FCC's policy offer anything to fill "this evidentiary void." Pet. App. 23a (Williams, J., dissenting).

Putting aside the evidentiary difficulties with the "programming diversity" rationale, the FCC's policy is not "narrowly tailored" to accomplish that asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained.

ARGUMENT

THE FEDERAL COMMUNICATIONS COMMISSION'S POLICY OF AWARDING A QUALITATIVE ENHANCEMENT FOR MINORITY OWNERSHIP IN COMPARATIVE LICENSE PROCEEDINGS VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

1. Classifications By The Federal Government On The Basis Of Race May Be Sustained Only If "Narrowly Tailored" To Achieve A "Compelling" Interest

A. The federal policy at issue in this case gives a preference to Black, Hispanic, Oriental, Indian, Eskimo, and Aleutian applicants for broadcast licenses. It plainly classifies on the basis

of race and is thus in tension with the fundamental principle embodied in the guarantee of equal protection that skin color and ethnic origin are generally inappropriate bases upon which to rest official distinctions between people. *Brown* v. *Board of Educ.*, 347 U.S. 483, 493-495 (1954); *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880). Accordingly, under this Court's equal protection cases, the FCC's preference policy is constitutionally suspect. See, *e.g.*, *Palmore* v. *Sidoti*, 466 U.S. 429, 432, 433 (1984).

The Court has determined, however, that government action based on race, although suspect, is not always unconstitutional. A court of equity may, for example, take race into account in remedying past acts of intentional, unlawful discrimination on the basis of race. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149 (1987); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Similarly, a competent governmental authority may in certain circumstances take race into account when necessary to remedy prior discrimination. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); see also *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

Nevertheless, the Court has made plain that " '[d]istinctions between citizens solely because of their ancestry' * * * [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). On that account, the Court has ruled that, to withstand constitutional scrutiny, a law classifying on the basis of race or ethnicity ordinarily "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' " of that purpose. *Palmore* v. *Sidoti*, 466 U.S. at 432-433.

B. Last Term, a majority of the Court for the first time "reach[ed] consensus on the appropriate constitutional analysis" (*Paradise*, 480 U.S. at 166) to be applied where a *state or local government* adopts a racial or ethnic preference in order to remedy past discrimination. In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that this use of race or ethnicity is subject to "strict scrutiny," that is, the racial or ethnic classification must be "narrowly

tailored" to achieve a "compelling governmental interest." *Id.* at 720-721 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 735 (Scalia, J., concurring in the judgment).

As Justice O'Connor explained in *Croson*:

> Absent searching judicial inquiry into the justification for * * * race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

109 S. Ct. at 721; see also *Wygant*, 476 U.S. at 273 (plurality opinion).

1. The first part of that constitutional analysis focuses on the asserted "compelling governmental interest" supporting the questioned classification, and involves two related inquiries: identifying the interest and determining whether it has a sufficient basis in fact. A majority of the Court has thus far endorsed only one justification for a racial preference that may in appropriate circumstances be sufficiently compelling: the government's interest "in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). See *Croson*, 109 S. Ct. at 721-723 (plurality opinion); *id.* at 743-745 (Marshall, J., dissenting); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624-625 (1984); see also *Wygant*, 476 U.S. at 274 (plurality opinion).[7]

[7] In addition, individual Members of the Court have suggested or found that the promotion of "racial diversity" may be a sufficiently compelling justification for the government to impose race-based measures, at least in the context of promoting a diverse student body or a diverse faculty in higher education. See *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-317 (Stevens, J., dissenting); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

The Court has also established that the asserted compelling justification for a racial classification must be based on "sufficient evidence." *Wygant*, 476 U.S. at 277 (plurality opinion); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment); see *Croson*, 109 S. Ct. at 727 (opinion of the Court). In *Croson*, the Court emphasized that there must be a "strong basis in evidence for [the government's] conclusion that remedial action was necessary." *Id.* at 724 (opinion of the Court) (internal quotation marks and citation omitted). In other words, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Ibid.* (quoting *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting)).

2. The second part of the constitutional analysis focuses on whether a racial classification is "narrowly tailored" to promote the compelling governmental interest. In this regard, two factors were specified by a majority of the Court in *Croson* and are particularly significant: (1) whether alternative race-neutral remedies were considered and attempted before resorting to race-conscious measures, see, *e.g.*, *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 283 (plurality opinion); *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring), and (2) whether the racial preference is limited to those who have in fact suffered the disadvantage or discrimination. See, *e.g.*, *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring); *Paradise*, 480 U.S. at 171 (plurality opinion); *Wygant*, 476 U.S. at 276 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). The Court has identified other factors relevant to the "narrow tailoring" inquiry as well, such as the flexibility and planned duration of the remedy, and the effect of the classification on innocent third parties. *Wygant*, 476 U.S. at 282-283 (plurality opinion); *id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 514-515 (Powell, J., concurring). A thorough consideration of these factors is essential in order to ensure "that the means chosen 'fit' [the asserted]

compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721 (plurality opinion).

C. In *City of Richmond* v. *J.A. Croson Co.*, *supra*, the Court had no occasion to determine the standard of review applicable to cases challenging racial preference programs adopted by the *federal government*—a threshold issue in this case. And although in *Fullilove* v. *Klutznick*, *supra*, the Court upheld a federal minority business enterprise preference program against a facial constitutional challenge, three separate opinions supported that judgment—none of which commanded more than three votes—and thus the Court did not resolve the preliminary question of the appropriate standard of review. Compare 448 U.S. at 453-495 (opinion of Burger, C.J., joined by White and Powell, JJ.); with *id.* at 495-517 (Powell, J., concurring); and *id.* at 517-522 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment).

In our view, racial classifications adopted by the federal government must also withstand the "strict scrutiny" applied to those adopted by state and local governments. Thus, federal minority preference programs, no less than state and local programs, must serve a compelling government interest and be narrowly tailored to achieve that interest. In applying this standard, however, we believe that courts should give greater deference to a determination by Congress that there is a compelling need for remedial action than would be accorded a similar determination by a state or local governmental body.

1. Although the Equal Protection Clause by its terms applies only to the States and not to the federal government, it is settled by the decisions of this Court that equal protection analysis under the Fifth Amendment is generally the same as that under the Fourteenth Amendment. *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 364-365 n.4 (1974). To be sure, the two protections are not coextensive for all purposes. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). But this Court has never suggested that the two Clauses supply different degrees of protection to individuals who have been disadvantaged

by official government action based on their race. See *Bolling* v. *Sharpe*, 347 U.S. at 499-500. To the contrary, the understanding that all racial classifications are suspect and must be subjected "to the most rigid scrutiny" was first articulated in a case involving the federal government, *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944), and the Court has specifically reaffirmed in the context of minority preferences that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *Paradise*, 480 U.S. at 166 n.16 (plurality opinion); *id.* at 196 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Indeed, from the point of view of an individual who has been penalized because of his race, it matters little whether the racial classification is sponsored by the federal government or by some other governmental entity. Accordingly, for the same reasons that *Croson* concluded that preferential racial classifications must be subject to strict scrutiny under the Fourteenth Amendment, we believe that such classifications must be subject to the same exacting standard of review under the Fifth Amendment.

At the same time, this Court's decisions in *Fullilove* and *Croson* suggest that there are important differences between the Congress and other governmental bodies in terms of their power to rectify prior discrimination. Congress, unlike state and local legislative bodies, is a national representative body. It may legislate only with the approval of both Houses—selected by constitutional design on different representational bases— and the concurrence of the President, who is "elected by all the people." *Myers* v. *United States*, 272 U.S. 52, 123 (1926). Thus, it may fairly be said that Congress is more likely than other, more parochial bodies to exercise its powers in ways that take into account the interests of all citizens. See generally The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961).

In addition, Section 5 of the Fourteenth Amendment specifically empowers Congress "to enforce, by appropriate legislation," the guarantee of equal protection set forth in Section 1 of that Amendment. When Congress exercises its "unique remedial powers" under the Fourteenth Amendment, *Croson*, 109 S. Ct. at 718 (opinion of O'Connor, J.), its identification of a compelling

need to assist the States in overcoming discrimination in a particular industry or segment of the economy should be accorded greater deference than a similar finding by a state or local legislative body. See *Croson*, 109 S. Ct. at 718-719 (opinion of O'Connor, J.); *Fullilove*, 448 U.S. at 472-480 (opinion of Burger, C.J.); *id.* at 499-506 (Powell, J., concurring). As Justice O'Connor concluded in *Croson*, 109 S. Ct. at 719, the Section 5 power "may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." See also *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966).

2. Although Congress has special powers to enforce the guarantee of equal protection, it is also of course subject to that guarantee. Thus, neither the structural guarantees of the Constitution, nor the express grant of "unique remedial powers" under Section 5 of the Fourteenth Amendment, can eliminate the need for careful judicial scrutiny of any program adopted by the federal government that classifies individuals by race. Accordingly, there remain important limitations on Congress's power to adopt racial preferences that have direct relevance in this case.

First, the reasons identified by the Court for giving greater deference to a congressional determination of a compelling need for a racial classification apply uniquely to *Congress*, not to other components of the federal government. Thus, neither *Fullilove* nor *Croson* stand for the proposition that a federal administrative agency, acting under a general grant of authority to regulate a particular industry in the public interest, should be entitled to any special deference if it makes a finding of prior discrimination within that industry, or identifies other potentially compelling governmental interests that might support the use of racial classifications. Cf. *NAACP* v. *FPC*, 425 U.S. 662 (1976). Congress may of course rely "on the administrative agency to flesh out [the] skeleton, pursuant to delegated rulemaking authority" (*Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.)); but, given the suspect nature of any program based on racial classifications, Congress itself must make the "critical determinations." *Ibid.* Cf. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976). And since

Congress acts only by enacting legislation, this should ordinarily mean that Congress must make its intention to require the use of a remedial racial classification "unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 109 S. Ct. 2397, 2400 (1989) (citation omitted).

Second, the Court's decisions also indicate that a determination by Congress that there is a compelling need for racial preferences may not be made in a vacuum. Chief Justice Burger concluded that the minority preference program at issue in *Fullilove* was within Congress's power only upon finding, after an extended review of the legislative background, that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-478. Justice Powell similarly concluded that Congress must have "made findings adequate to support its determination that minority contractors have suffered extensive discrimination." *Id.* at 502. Ordinarily, of course, a reviewing court will not demand that Congress have a factual basis in support of whatever legislation it enacts. See *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). But as the Court has stated in an analogous context, "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong*, 426 U.S. at 103.

Third, while significant deference should be given to a congressional determination that there is a compelling need for a remedial racial preference, a similar degree of deference is not appropriate in deciding whether the particular remedy chosen by Congress is "narrowly tailored" to achieve that compelling interest. As Justice Powell has observed, Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove*, 448 U.S. at 502-503 (concurring opinion). Congress may thus be said to have special competence

to determine whether particular sectors of the national economy have been historically afflicted by discrimination, and to assess the continuing relevance of this discrimination in the present day. But Congress does not enjoy a similar advantage in ensuring that remedies adopted for rectifying past wrongs are formulated in such a way as to minimize the intrusion upon individual rights. Cf. *Katzenbach* v. *Morgan*, 384 U.S. at 668-670 (Harlan, J., dissenting).

As Chief Justice Burger observed in *Fullilove*, it is important that there be a "careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." 448 U.S. at 480. Accordingly, in reviewing the minority set-aside in that case, he took into account Congress's consideration of alternative race-neutral means and the actual flexibility and duration of the measure adopted, stressing the program's limitation to correcting the actual effects of discrimination. *Id.* at 463-476, 480-482, 487-488.[8] Likewise, Justice Powell carefully reviewed the congressional program in light of factors similar to those identified by the Chief Justice. *Id.* at 510-515. The understanding that any racial classification adopted by Congress must be "narrowly tailored" to achieve a valid remedial purpose is reinforced by opinions of individual Members of the Court in *Croson*. Justice O'Connor, joined by the Chief Justice and Justice White, expressly recognized that the "fine tuning" of the minority set-aside in *Fullilove*, see note 8, *supra*, was a constitutional prerequisite. See 109 S. Ct. at 718. And Justices Stevens,

[8] Chief Justice Burger emphasized, for example, that the minority set-aside provision "cannot pass muster unless * * * it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively." *Fullilove*, 448 U.S. at 487. He then explained that the program's racial presumption "may be rebutted," *ibid.*, that there was available a "complaint procedure * * * for reporting 'unjust participation by an enterprise * * * in the * * * program,' " *id.* at 488, and that no minority business enterprise may "exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination," *ibid.*

Kennedy, and Scalia also acknowledged in separate opinions that such tailoring of a racial classification to the asserted remedial purpose was constitutionally essential. See *id.* at 730 n.1 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 734 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 735-739 (Scalia, J., concurring in the judgment).[9]

3. In sum, a racial classification adopted by the federal government, no less than a state or local government, should be subject to an exacting standard of review. Like any racial classification, a federal preference program must be designed to achieve a compelling governmental interest. In deciding whether such an interest exists, a determination made by Congress that there is a need for remedial race-conscious action is entitled to significant deference. But this additional measure of deference is appropriate only if Congress itself makes the critical determination that such a program is required, and only if this determination has an adequate basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling governmental interest identified by Congress.

II. The Federal Communications Commission's Policy Of Awarding A Qualitative Enhancement For Minority Ownership In Comparative License Proceedings Is Not "Narrowly Tailored" To Achieve A "Compelling" Interest

The question for decision in this case, therefore, has two components: first, whether any "compelling" governmental interest

[9] Analogous support for this conclusion is also supplied by the Court's decisions assessing the constitutionality of gender classifications in federal statutes. The Court has always required the same degree of "fit" between a gender classification and the governmental interest asserted in support of that classification, whether the statute was enacted by Congress or by one of the States. *Rostker* v. *Goldberg*, 453 U.S. 57, 69-70 (1981). Moreover, the Court has applied the same exacting standard of review to federal gender classifications even when the discrimination is directed against men rather than women, and even when a remedial objective has been asserted in support of the differential treatment. See *Califano* v. *Goldfarb*, 430 U.S. 199, 210-212 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 642-645 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (plurality opinion). These authorities suggest that the mere invocation of a "remedial" justification for a racial classification should not result in any relaxation of the requirement that such classifications be "narrowly tailored."

may be found to justify the FCC's policy of awarding preferences in comparative license proceedings on the basis of race or ethnic origin; and second, whether that policy is "narrowly tailored" to achieve an identified compelling governmental purpose. The Commission's policy fails both tests.

A. 1. So far, this Court has endorsed only one sufficiently compelling justification for a racial classification, namely, remedying the effects of identified present or past racial discrimination. See p. 10, *supra*. Although the majority below relied upon this justification in upholding the Commission's policy (Pet. App. 10a-11a), we do not believe that asserted interest may be invoked here for several reasons.

a. Congress has not specifically mandated that the Commission maintain a policy of granting preferences to minority applicants in comparative license proceedings in order to remedy prior discrimination. Thus, it cannot be said that Congress has, through appropriate statutory language, made an authoritative determination that there is a compelling need to rectify the effects of discrimination in the broadcasting industry. See pp. 14-15, *supra*.[10]

[10] We note that even if Congress had legislated with the requisite specificity, it would be questionable whether such legislation could be characterized as an exercise of Congress's powers under Section 5 of the Fourteenth Amendment. If Congress found that the *FCC* had maintained discriminatory policies in awarding broadcast licenses, the resulting inequalities would be a product of unlawful federal action remediable under the Fifth Amendment, rather than unlawful state action subject to Sections 1 and 5 of the Fourteenth Amendment. Moreover, given that the broadcasting industry has been pervasively regulated by the FCC since 1934 (and by the Federal Radio Commission before that under the Radio Act of 1927, see Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162), it is difficult to imagine what unlawful action taken by the *States* might give rise to inequalities in the broadcasting industry, except for the most general "societal discrimination." See pp. 21-22, *infra*. Section 5 of the Fourteenth Amendment, however, gives Congress power to legislate only with respect to Section 1 of that Amendment, governing state as opposed to federal action.

This case therefore differs from *Fullilove*, where Congress could be said to be acting under Section 5 to rectify past discrimination in the awarding of public works contracts *by the States*. In any event, the Court need not reach the broader question whether Congress would have the power to adopt remedial race-conscious legislation for the broadcasting industry under Section 5 of the Fourteenth Amendment (or for that matter, under Section 2 of the Thirteenth Amendment, see *Jones* v. *Alfred H. Mayer & Co.*, 392 U.S. 409 (1968)), since in our view it is clear that Congress has not attempted to do so with the requisite specificity or with the kind of supporting evidence required by *Fullilove*.

The only congressional action directly relevant to this program is the enactment of three successive appropriations riders, each of which provides that the FCC is not to spend appropriated funds during a given fiscal year "to repeal, to retroactively apply changes in, or to continue a reexamination of [the Commission's minority preference policy]." 101 Stat. 1329-31 to 1029-32; 102 Stat. 2216-2217; 103 Stat. 1020-1021. The appropriations riders, by their terms, do not purport to mandate the use of a particular racial classification; nor do they charge the Commission with any remedial duties or make any findings of prior discrimination affecting the broadcasting industry. At most, they direct that the status quo be maintained with respect to *the Commission*'s policies – policies that have always been grounded in the "programming diversity" rationale, rather than in any finding of prior discrimination (see p. 22, *infra*). That call for "a kind of mental standstill," as Judge Williams observed, Pet. App. 35a, scarcely resembles a legislative directive requiring the use of a racial classification in comparative license proceedings. See *Hampton* v. *Mow Sun Wong*, 426 U.S. at 114-116; see also *TVA* v. *Hill*, 437 U.S. 153, 190-191 (1978).[11]

The sparse legislative history of the appropriations riders confirms that Congress's delphic action cannot be regarded as an effort to remedy identified past or present discrimination. For example, the Senate Appropriations Committee, which was re-

[11] In 1982, Congress amended the Communications Act to authorize the FCC to award licenses under a random selection system, and specifically directed the Commission, in creating any such lottery procedure, to grant "an additional significant preference * * * to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A). By its terms, however, that provision does not purport to require the Commission to grant a similar preference in comparative proceedings, and the pertinent legislative history contains no suggestion that Congress so intended. See, *e.g.*, H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-44 (1982); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

sponsible for the language in the 1987 rider, stated that the Commission's reexamination of its preference policy was "unwarranted," in part because

> [t]he Congress has expressed its support for [that policy] in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority • • • audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987); see also S. Rep. No. 388, 100th Cong., 2d Sess. 79 (1988). Indeed, the only Committee Report that mentions even in passing a possible *remedial* justification for the Commission's policies is that associated with a *different* minority preference policy—the preference applicable to a lottery system. See 47 U.S.C. 309(i)(3)(A) and notes 3 and 11, *supra*. In these circumstances, the legislative record does not suggest, let alone confirm, that Congress made any "considered decision" (*Fullilove*, 448 U.S. at 473) that minority preferences are necessary in comparative hearings to remedy the effects of racial discrimination in the broadcasting industry.

b. Even if Congress could somehow be viewed as having adopted a remedial justification, it cannot be said that Congress had sufficient evidence before it of prior discrimination in the broadcasting industry to justify race-conscious relief. See, *e.g.*, *Croson*, 109 S. Ct. at 727 (opinion of the Court); *Wygant*, 476 U.S. at 277 (plurality opinion); *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting). To the contrary, the sparse legislative record associated with the appropriations riders plainly shows that Congress had no basis—certainly no articulated basis—for finding that either the Commission or the broadcasting industry in general has engaged in racially discriminatory practices that hampered minorities' ability to own broadcasting licenses. See, *e.g.*, Pet. App. 38a-39a. Nor does the bare mention of a possible remedial justification in the legislative history of the lottery program constitute the kind of factual predicate necessary to sustain the use of a racial classification. Compare *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.) (relying on extensive legislative history of related legislation).

Indeed, as far as we are aware, the only argument that could be advanced in support of the Commission's preference policies as a remedial measure would be that, because of prior societal discrimination, minority groups have fewer financial resources than nonminorities, and thus have not been able to purchase the radio and television stations that regularly become available on the resale market.[12] But this Court has made clear in the context of state and local preference policies that "societal discrimination," standing alone, cannot justify a racial classification. See *Croson*, 109 S. Ct. at 723 (plurality opinion). As Justice Powell observed in *Wygant*:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. • • • No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive.

476 U.S. at 276 (plurality opinion); accord *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

While Congress can no doubt legislate more broadly than state and local bodies, this Court has never held that generalized societal discrimination, by itself, is sufficient to sustain a federal minority preference program. In sustaining a federal minority set-aside program for federally funded state public works projects in *Fullilove*, the Court was careful to note that Congress had before it evidence that prior discrimination had infected the construction industry, and therefore justified the exercise

[12] Large numbers of radio and television stations are transferred each year in private transactions that appear to be routinely approved by the FCC. Indeed, based on the FCC's estimate that approximately one-half of all transfer applications appr ed each year reflect station sales (as opposed to reorganizations), it would appear that approximately 9% of all broadcast stations (representing roughly 1000 radio stations and 250 television stations) are sold in any given year (based on averages over the past 10 years). See Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988). Accordingly, it is reasonable to assume that the principal impediment to increased minority ownership of broadcasting outlets in today's market is the fact that members of minority groups have fewer of the financial resources needed to acquire and operate radio and television stations.

of Congress's remedial powers. See 448 U.S. at 456-467 (opinion of Burger, C.J.); *id.* at 502-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment). Here, there can be no claim that Congress had before it evidence suggesting that minorities have been denied any opportunity to acquire broadcasting facilities because of official or private acts of discrimination. This is rather a case like *Croson*, in which "[t]here is nothing approaching a prima facie case of constitutional or statutory violation by *anyone*" in the broadcasting industry. 109 S. Ct. at 724 (opinion of the Court).

c. Finally, the FCC, the agency that promulgated the "policy" Congress has frozen, has consistently taken the position that that policy is *not* designed to remedy prior discrimination in the broadcasting industry. In this case, for example, the Commission has made plain that its "goal in implementing the preference policy • • • has not been to remedy prior discrimination against minorities or to provide remedial benefits." FCC C.A. Br. 30; see Pet. App. 11a n.6, 33a. That position stems from the fact that "[t]here has never been a finding, nor • • • even an allegation, that the FCC engaged in prior discrimination against racial minorities • • • in its licensing process." *Id.* at 33a. Accordingly, under settled principles of administrative law, the racial classification at issue here may not be sustained on the basis of any agency finding of the need for remedial action. See, *e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

2. Even if it could be said that the FCC's preference policy was adopted to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose. First, neither Congress nor the Commission has considered, much less tried, less intrusive race-neutral means to increase minority ownership of broadcasting licenses. See, *e.g.*, *Croson*, 109 S. Ct. at 728; *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring). Before 1978, the Commission had adopted various race-neutral policies designed to increase diversity of *programming*, see *1978 Policy Statement*, 68 F.C.C. 2d at 980, 981; but it has never undertaken any race-neutral steps to augment diversity of *ownership*, either prior to adopting its preference policies or since then. Moreover, the minority preference policy is not aimed at correcting the actual effects of past discrimination. See, *e.g.*, *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring in part and concurring in the judgment); *Paradise*, 480 U.S. at 171 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). In particular, the policy, as applied, does not permit an inquiry to determine whether any particular minority applicant was in fact not disadvantaged by past discrimination. As Judge Williams observed, "it is hard to see how a program can be 'narrowly tailored' as a remedy for societal discrimination if competitors have no opportunity to show that individual beneficiaries have suffered no impairment of their license-securing ability attributable to that discrimination." Pet. App. 43a-44a.

To be sure, as the court of appeals pointed out, "minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses," Pet. App. 14a, and the Commission will not even consider that factor where an applicant has a clear quantitative advantage over its rivals. See p. 2, *supra*. But the fact that explicit consideration of race or ethnic background may not be dispositive in every case does not mean that such consideration is "narrowly tailored" in a constitutionally relevant sense. For example, it does not mean that the policy will be applied only to those who are truly disadvantaged or only when it will not injure innocent third parties. As this case suggests, minority ownership can be the determinative factor in a comparative license proceeding, whether or not a minority applicant can show he has been disadvantaged. Pet. App. 10a. And as Judge Williams noted, the FCC's policy can clearly injure third parties; indeed, "Rainbow's victory, in which the minority preference was dispositive, deprived the other competitors of their only chance for a new license for the foreseeable future." *Id.* at 44a. Thus, the fact that the Commission's preferences do not affect every case at most limits the class of those with standing to challenge the policy to those actually injured by its application to them.

B. 1. The second asserted justification for the minority preference policy—and the one on which the Commission prin-

cipally relies—is to further diversity of programming. See, *e.g.*, Pet. App. 11a n.6, 19a. This asserted justification is clearly different from any of the rationales previously considered by this Court in support of minority preference programs, including the interest in promoting "racial diversity" in higher education, which Justice Powell found to be a compelling governmental interest in his opinion in *Bakke*. See 438 U.S. at 311-315; see also *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-317 (Stevens, J., dissenting). No issue is presented here as to whether promoting "racial diversity" may *ever* constitute a compelling governmental interest;[13] the only question is whether racial preferences may be adopted because of their asserted instrumental value in promoting an entirely different type of "diversity"—diversity in programming.

a. There is reason to question whether that justification, as applied to the public broadcast spectrum, may ever qualify as a compelling governmental interest. This Court has long recognized that "the widest possible dissemination of information from diverse * * * sources is essential to the welfare of the public" and is plainly a legitimate governmental interest. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); see, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978). Nevertheless, the Court has never held that such a quest for diverse information is a sufficiently compelling justification for the government's use of a racial classification. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). "Programming diversity," and the related notions of "minority" or "nonminority" programming, are "elusive concepts, not easily defined let

[13] The FCC has not suggested that it may seek to promote diverse ownership as an end in itself. As Justice Powell stated, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307; accord *Croson*, 109 S. Ct. at 721 (plurality opinion); *id.* at 730-734 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 735, 739 (Scalia, J., concurring in the judgment). The FCC's programming diversity rationale is more akin to the argument that preferences should be given to minority applicants to medical schools in order to ensure a sufficient number of doctors willing to serve minority communities—a justification Justice Powell specifically rejected as unwarranted by the evidence in *Bakke*. See 438 U.S. at 310-311.

alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *National Citizens Comm. for Broadcasting*, 436 U.S. at 796-797. Moreover, the programming diversity rationale appears to require official identification and labelling of, among other things, "Black," "Hispanic," and "Aleutian" programming and viewpoints, and indulging in the assumption that we can tell how someone will *think* and *act* based solely on the color of his skin. This type of racial stereotyping is anathema to fundamental constitutional principles. *E.g.*, *Croson*, 109 S. Ct. at 721 (plurality opinion); *id.* at 730-734 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 735, 739 (Scalia, J., concurring in the judgment); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.); *Wygant*, 476 U.S. at 274-276 (plurality opinion); *Loving* v. *Virginia*, 388 U.S. at 10-11.

b. Even if programming diversity might in theory qualify as a compelling governmental interest, the next question would be whether Congress itself has adopted this justification.[14] Here again, Congress has never enacted a statute expressly directing or authorizing the Commission to prefer minorities in comparative license proceedings in order to increase programming diversity. It has only directed the Commission to preserve the status quo with respect to an FCC policy originally justified on such grounds. See pp. 19-20, *supra*. To be sure, the legislative history of the various appropriations riders suggests that individual members of Congress approved of that rationale, see, *e.g.*,

[14] Questions about whether Congress could be said to have the power to adopt a minority preference policy for the broadcasting industry under Section 5 of the Fourteenth Amendment (see note 10, *supra*) are compounded when the rationale for such a policy is based on the need to enhance programming diversity, rather than to remedy past discrimination. The Section 5 power extends only to the enforcement of Section 1's guarantee that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The goal of programming diversity, however, is not derived from the Equal Protection Clause, but rather from the policies of the Federal Communications Act. Thus, although the Court need not reach the question, we think it very doubtful that a congressionally mandated program of minority preferences designed to enhance the diversity of programming could be justified as an exercise of Congress's power under Section 5.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987); 134 Cong. Rec. S10,021 (daily ed. July 27, 1988) (statement of Sen. Hollings); 133 Cong. Rec. S14,395 (daily ed. Oct. 15, 1987) (statement of Sen. Lautenberg). But Congress may work its will only by enacting legislation, cf. *INS* v. *Chadha*, 462 U.S. 919, 952 (1983), and general statements contained in the legislative history—which were not voted on by the Congress, perhaps not even seen by many of its members, and certainly not presented to the President—cannot substitute for an express statutory provision mandating the use of preferences. See pp. 14-15, *supra*; cf. *Tafflin* v. *Levitt*, No. 88-1650 (Jan. 22, 1990), slip op. 3-4 (Scalia, J., concurring).

c. In any event, even if it could be said that Congress had expressly directed the Commission to award minority preferences in order to enhance programming diversity, it cannot be said that Congress had an adequate basis in fact to support the imposition of such an inherently suspect racial classification. As Judge Williams observed (see Pet. App. 22a), in order to demonstrate the need for racial preferences on this score, it would be necessary to show three things: (1) that different racial or ethnic groups have distinctive listening or viewing tastes; (2) that one or more of these distinctive racial or ethnic tastes are being undersupplied by today's broadcasting industry; and (3) that increasing the percentage of minority owners would overcome the shortage of programming that serves these distinctive tastes. To the extent that Congress even perceived the need to resolve these questions, however, it merely assumed the answers. There is scattered anecdotal evidence offered by various individuals and interest groups in congressional hearings that might support one or more of these propositions.[15] But the pertinent dimensions of the problem

[15] See *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [*1989 Hearing*]; *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

remained "unmeasured, unexplored, or unexplained" by Congress. *Croson*, 109 S.Ct. at 735 (Kennedy, J., concurring in part and concurring in the judgment). Where, as here, Congress has not affirmatively enacted legislation based on any finding that race is a reliable proxy for programming choices, such an unfocused gathering of information is an inadequate basis for invoking an otherwise suspect racial classification.[16]

Nor does the administrative history of the FCC policy offer anything to fill "this evidentiary void." Pet. App. 23a (Williams, J., dissenting). The Commission initially adopted its policy not after any careful study of the need for additional programming diversity and the relationship between ownership and programming, but rather at the direction of the court of appeals for the District of Columbia Circuit. See pp. 2-3, *supra*. The court of appeals, in turn, merely assumed that there was inadequate "minority" programming, and that increased minority ownership would rectify this shortcoming. See *Garrett*, 513 F.2d at 1063.

The administrative record compiled by the Commission, such as it is, confirms that the Commission also acted on the basis

[16] In the court of appeals, the Commission suggested that Congress could have properly relied on a recent report filed by the Congressional Research Service that purports to document a correlation between minority ownership and diverse programming. Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988); see FCC C.A. Br. 46-47. That report, for the reasons stated by Judge Williams (see Pet. App. 23a-29a), is so fundamentally flawed as to deprive it of any significance.

In any event, apart from one passing reference to that report in the pertinent legislative record, see 134 Cong. Rec. S10,021 (daily ed. July 27, 1988) (statement of Sen. Hollings), there are no indications that Congress even considered, let alone accepted, the tentative findings in the CRS survey in connection with maintaining the appropriations provision blocking the FCC's inquiry proceeding. Indeed, Senator Inouye, a leading proponent of the Commission's minority preference policies, recently acknowledged that Congress "need[s] to demonstrate that minority * * * ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves." *1989 Hearing* at 2.

of untested assumptions.[17] In fact, the Commission has candidly admitted the lack of an evidentiary predicate for the preference policy. In 1986, the FCC conceded that no Commission proceeding establishes as a fact that

> the race • • • of an owner necessarily has a direct nexus to program content. • • • The substantial deference normally accorded the Commission's judgmental and predictive determinations cannot justify reliance on suspect classifications to enhance program diversity in the absence of a clear and specific foundation upon which to base its conclusion. Here the agency needs a factual basis to support the assumed nexus, but none has ever been established.

Brief for FCC on Rehearing En Banc at 27-28, *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). It was precisely for that reason that the Commission initiated its inquiry proceeding in December 1986. See note 1, *supra*. Congress, however, terminated that investigation, see note 4, *supra*, and thus the Commission has been unable to determine whether the asserted purpose of the minority preference policy adopted over a decade ago has or ever had any factual support.[18]

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[17] For example, the *1978 Policy Statement*, 68 F.C.C.2d at 981, quotes the *Task Force Report*. The *Task Force Report*, in turn, relies on decisions such as *TV 9* and *Garrett* for its endorsement of the proposition that increased minority ownership will promote "greater diversity in the media." *Task Force Report* at 4; see *id.* at 4-6.

[18] Recent developments in broadcasting undermine the proposition that there is a lack of diversity in (or that minority viewpoints are not being served by) current programming. In abandoning the "fairness doctrine," the Commission determined intervention was no longer necessary to ensure balanced broadcast presentation on matters of public interest because there are now a "sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance." *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 208 (1985); see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, No. 89-312 (Jan. 8, 1990). The Commission has also recognized that those changes in the marketplace

> have resulted in [a] • • • rich array of information and entertainment programming, and, further, that this phenomenon of increased competition driving increased program diversity will continue. These findings demonstrate that in the current environment there is little if any basis to assume that racial or gender preferences are essential to the availability of minorities' and women's viewpoints. Thus, rather than there being a record to demonstrate that these preferences are essential, what record is available suggests otherwise.

Brief for FCC on Rehearing En Banc at 26-27, *Steele* v. *FCC*, *supra*.

2. Putting aside the evidentiary difficulties with the "programming diversity" rationale, that policy is not "narrowly tailored" to achieve the asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained. This Court has made clear that such a feature, which renders the preference policy potentially "ageless in [its] reach into the past, and timeless in [its] ability to affect the future," *Wygant*, 476 U.S. at 276 (plurality opinion), precludes the use of a racial classification. See, *e.g.*, *Croson*, 109 S. Ct. at 723 (plurality opinion); *Paradise*, 480 U.S. at 171 (plurality opinion). As Judge Williams observed, "[p]lainly there can be no assurance of an end to the racial preference if there is no way—except the Commission's conclusory say-so—of ascertaining when the goal is reached." Pet. App. 27a.

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Apart from the substantial doctrinal flaws identified above, the Federal Communications Commission's use of a racial classification cannot overcome a more fundamental hurdle—the prerequisite of coherence. The Commission's use of racial preferences remains today as much as ever a policy in search of a purpose and an adequate supporting record. That policy was conceived by a court, Congress has refrained from enacting affirmative legislation, and the Commission has been blocked from completing the administrative inquiry proceeding it determined was necessary to justify its own policy. This confused state of affairs now leaves this Court to speculate about the reasons for the policy and to piece together an appropriate supporting record. Racial classifications, when imposed by the government, must at a minimum reflect the deliberate judgment of a competent

authority that such measures are necessary for specific purposes. Because that predicate is plainly absent here, the Commission's policy cannot be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
JAMES P. TURNER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROGER CLEGG
Deputy Assistant Attorney General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

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* The Solicitor General is disqualified in this case.

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